IN THE
MISSOURI SUPREME COURT

BRANDON HUTCHISON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 85548
	)	
STATE OF MISSOURI,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF LAWRENCE COUNTY, MISSOURI
39th JUDICIAL CIRCUIT, DIVISION I
ORIGINAL POSTCONVICTION ACTION – HON. J. EDWARD SWEENEY, JUDGE
REMAND HEARING – HON. DAVID DARNOLD, SENIOR JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Brandon Hutchison, incorporates the jurisdictional statement from his original brief.

STATEMENT OF FACTS

Brandon incorporates the Statement of Facts from his original brief.

POINTS RELIED ON

I. Justice for Sale

The State defends Lopez's payment of money for a ten year sentence, never acknowledging:

A. the Missouri Constitutional provision, Art.I, Section 14, that justice shall not be for sale;

B. the contents of the record, showing that payment of the money to the victims was linked to the prosecutor reducing the charges from first-degree to second-degree murder and offering Lopez 10 years and the judge's actual sentencing Lopez to 10 years;

C. both prosecutor and judge knew that the agreement for 10 years was being made so the victims' family would be paid money;

D. cases require that a prosecutor do what is just and fair under the law and evidence, not what the victim's family requests;

E. the prosecutor's concern that because Lopez could buy a 10 year sentence, he was treated differently than similarly-situated defendants; and

F. the plea agreement furthered no legitimate state interest, but ran counter to the prosecutor's desire to punish defendants according to the severity of their crime, not their ability to pay the victims' family.

State v. Barnett, 980 S.W.2d 297 (Mo.banc1998);

State v. Taylor, 944 S.W.2d 925 (Mo.banc1997);

Payne v. Tennessee, 501 U.S. 808 (1991);

Griffin v. Illinois, 351 U.S. 12 (1956); and

Mo. Const. Art. I, Sec. 14.

II. Jury Misled About Whether Lopez Would Receive Leniency for his Testimony

The State's argument that Lopez did not lie when he said the prosecutor was giving no deals is contrary to the record; the State improperly contends that the prosecutor did not mislead the jury by arguing that Lopez convicted himself of first-degree murder and would be held responsible, since the prosecutor intended to reduce the charges to second-degree murder and agree to a term of years; and Lopez's testimony that he hoped to receive leniency did not turn the tainted trial, based on false testimony, into a fair one.

Banks v. Dretke, 124 S.Ct. 1256 (2004);

Napue v. Illinois, 360 U.S. 264 (1959);

People v. Savvides, 136 N.E.2d 853 (N.Y.App. 1956); and

Strickler v. Greene, 527 U.S. 263 (1999).

III.[1] Counsel Did Not Investigate Brandon's Background

The State ignores *Wiggins'* directives that counsel investigate all reasonably available mitigating evidence and that reviewing courts consider all the evidence counsel failed to present, along with that presented at trial to determine prejudice; the State ignores the trial attorneys' testimony that they did not adequately investigate Brandon's background and life history, failing to interview his treating psychiatrist, obtain background records, consult with experts, and interview family and friends; and the State improperly exaggerates the mitigating evidence presented at trial, thereby attempting to argue the failure to investigate mitigation did not prejudice Brandon.

Wiggins v. Smith, 123 S.Ct. 2527(2003);

Williams v. Taylor, 120 S.Ct.1495 (2000);

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Parker v. Dugger, 498 U.S. 308 (1991).

[1] This reply responds to Points III, V, VI, and VII, which address counsel's failure to investigate and present mitigating evidence.

IV. Appellate Counsel's Effectiveness Is Reviewed Under *Strickland* Standard and Death Penalty Cases Mandate Careful Scrutiny, Including Review of All Colorable Claims

The State's argument that appellate counsel's ineffectiveness is judged by the plain error standard is contrary to precedent. Its suggestion that counsel may winnow meritorious claims in a capital case violates the principle that, since death is different, every colorable claim of error must be carefully scrutinized.

Smith v. Robbins, 528 U.S. 259 (2000);

Deck v. State, 68 S.W.3d 418 (Mo.banc2002);

Zant v. Stephens, 462 U.S. 862 (1983); and

Wiggins v. Smith, 123 S.Ct. 2527 (2003).

ARGUMENTS

I. Justice for Sale

The State defends Lopez's payment of money for a ten year sentence, never acknowledging:

A. the Missouri Constitutional provision, Art.I, Section 14, that justice shall not be for sale;

B. the contents of the record, showing that payment of the money to the victims was linked to the prosecutor reducing the charges from first-degree to second-degree murder and offering Lopez 10 years and the judge's actual sentencing Lopez to 10 years;

C. both prosecutor and judge knew that the agreement for 10 years was being made so the victims' family would be paid money;

D. cases require that a prosecutor do what is just and fair under the law and evidence, not what the victim's family requests;

E. the prosecutor's concern that because Lopez could buy a 10 year sentence, he was treated differently than similarly-situated defendants; and

F. the plea agreement furthered no legitimate state interest, but ran counter to the prosecutor's desire to punish defendants according to the severity of their crime, not their ability to pay the victims' family.

The State's argument responding to Brandon's claim that justice was for sale, because his co-defendant paid the victims' family $230,000.00 for a 10-year sentence, fails to acknowledge the constitutional mandate that justice not be for sale; the cases supporting Brandon's claim; and the contents of the record proving the claim (Resp.Br.at 12-25).

State Constitutional Law Claim

The State never acknowledges Missouri Constitution, Article I, Section 14, which provides: "Justice shall be administered without sale, denial or delay." Rather, it selectively cites portions of the record and ignores others, including its own exhibits, in its effort to claim that justice was not for sale.

The State argues that the prosecutor and the trial judge were not involved in the victims' and Lopez's friendly civil agreement, and thus, justice was not for sale (Resp.Br. at 16). The State ignores that Lopez would pay the victims' family thousands of dollars, only if the prosecutor reduced the charges and agreed to a ten-year sentence (Ex.85,at 2, R.Tr.51). The State ignores that no money would change hands unless and until the judge actually sentenced Lopez to ten years or less (R.Tr.49).

Lopez's attorney wrote the terms. He agreed to provide proof that he had in his trust account, the $230,000.00, which would be paid to Hays' clients if:

a) your clients recommend to the prosecuting attorney in Lawrence County that Freddie Lopez receive no more than ten (10) years in prison for the wrongful deaths at issue in this case,

b) that the recommendation is made to the prosecuting attorney prior to November 21, 1997, and

c) the sentencing judge actually sentences Freddie Lopez to a prison term not to exceed ten (10) years.

(Ex.85,at 2, R.Tr.51). The civil agreement was contingent on the prosecutor and judge's actions in the criminal case. The State knows it. Yet, it selectively cites to portions of the record and ignores the overwhelming evidence that Lopez paid $230,000.00 for a ten-year sentence.

Remarkably, the State argues that the prosecutor and judge were unaware that Lopez had to get 10 years for the family to get the settlement (Resp.Br.at 16). The testimony of the prosecuting attorney and the State's own exhibits refute this. Prosecutor George described how Joyce Kellum asked him to recommend 10 years so her family could get paid (Ex.88,at 47). She had always wanted death for all three defendants and felt like she was selling out her sons. *Id.* at 47-48. Lopez's family would pay them, but only if they recommended 10 years to the prosecutor. *Id.* at 49.

George agreed to reduce the charges from first to second-degree murder and to concurrent 10 year sentences (Ex.81, Ex.79, at 9, Plea Exs.A and B). He did not like this agreement, thinking Lopez deserved more time, but he recommended it at the victims' request so they could get paid (Ex.88,at 49,57-58). The whole thing left a "bad taste in [his] mouth." *Id.* at 50.

Judge Sweeney also knew the plea agreement was made so the victims' family would get paid. At least two months before the plea, Judge Sweeney wrote: *"because some type of monetary award might be forthcoming to the children of the Yates' it might affect any*

ultimate disposition" (State's Ex.OO, R.S.L.F.45). The judge did not distance himself from this deal, but instructed the parties on how it should be handled:

> If Mr. Wampler has a proposal, it should be submitted to Mr. George by September 29. That should be conveyed to the victims by October 10. A response thereto should be made by November 1. If acceptable to the daughters of Ronnie Yates, there needs to be a victim impact statement to that effect. *For the children of Brian Yates, I assume the grandmother would have to agree and a formal guardianship set up.* This could all take place before our scheduled motions of November 21, and Mr. Lopez could plead that date. If no resolution is reached by November 21, then the case will go to trial. I will expect Mr. George to make this clear to the victims. Mr. Wampler should make this clear to Mr. Lopez.

(State's Ex.OO, R.S.L.F.45) (emphasis added).

The State also ignores Lopez's attorney's written statements, connecting the civil and criminal proceedings:

> I spoke with Shawn Askinosie this morning and he indicated that the judge has agreed to sentence Freddie Lopez on the same day as the plea, which is scheduled on November 21, 1997. I expect that I will have the $230,000 in my trust account by tomorrow morning and not later than Thursday morning of this week. As soon as I have confirmation that the money is in my account, I will let you know. In the meantime, I would appreciate it if you could share to me the recommendation that is going to be made by the family. *I fully*

understand that you need to have confirmation that the money is in my account before the recommendation will become final and made to the judge.

(Ex.85,at 3) (emphasis added).

Lopez pled on November 21, 1997, but his sentencing was continued until after he paid the money (Ex.79,at 33, R.Tr.159-60). After a $230,000.00 cashier's check was paid into Sivils' trust account on December 4, 1997 (Ex.85,at 5), and Sivils faxed a copy of that check to Hays (Ex.85,at 4), the court sentenced Lopez to concurrent ten-year sentences (Ex.79,at 48).

Federal Constitutional Claims

The State's response to Brandon's claim that Lopez's buying a 10-year sentence denied Brandon due process, equal protection, and freedom from arbitrary imposition of death ignores the constitution, the case law, and the contents of the record. The thrust of the State's argument is that the prosecutor simply deferred to the victims' family's wishes and did not agree to a sentence less than death for improper reasons (Resp.Br.21-24). The State claims: "[n]ot one witness testified that the prosecutor sought the death sentence against appellant for any inappropriate reason or that the prosecutor decided to plea bargain with Freddy Lopez for any inappropriate reason." (Resp.Br.22). This ignores the prosecutor's own testimony. He agreed to the sentence so the family would be paid money, not because he thought it was a just sentence under all the circumstances:

I wanted – the family came to me and said they wanted ten years. *I wanted at least 20 to 30 years for a multiple homicide defendant and I didn't want this ten year recommendation that she was making*.

Q. And did she tell you why she – was she making this ten year recommendation, or did she say she was making this ten year recommendation based on the money that had been offered to her?

A. She was making that because the civil attorneys – I don't know if you're aware, but *Mr. Lopez's family won a lottery*[2] out in California and the civil attorneys had come, that were representing Mr. Lopez or negotiating this on behalf of Mr. Lopez, had contacted Mr. Hayes and had said we will agree to pay – as I understand it, we will agree to pay in to the family, but the family has to recommend a ten year sentence to the prosecutor because I still was not accepting a ten year sentence on this case. The defense attorneys came to me – I believe Mr. Wampler came to me and said that there was going to be some negotiations done and I said I'm not going to be a part of that. *And to*

[2] Whether someone lives or dies should not depend on which defendant wins the lottery and can pay for a sentence less than death. Death sentences should be based on an individual's moral culpability, not his wealth. The disposition in Brandon's case is akin to Mrs. Hutchison's fate in Shirley Jackson's "The Lottery." The story can be found at http://mbhs.bergtraum.k12.ny.us/cybereng/shorts/lotry.html and is included in the Appendix for this Court's convenience (A 1-7).

this day, it still leaves a bad taste in my mouth that Lopez got ten years on both of those cases.

Q. Did you – and the record reflects – did you ultimately agree to recommend ten years?

A. *At the request of the victims' family, and I think I put in there that this is against the recommendation of the State*.

(Ex.88,at 49-50)(emphasis added). The prosecutor repeated his belief that the ten year sentence was inappropriate given the facts and circumstances:

Q. Did you tell Judge Sweeney that the victims' family would be paid some money for recommendation to the court on a sentence Mr. Lopez would receive?

A. I don't recall if I ever did that until the date that we took the plea on Lopez and when I – I'm not certain about this. Whether it was outside the court, off the record, or if I made a comment on the record to Judge Sweeney that these recommendations were against my recommendation, *the only reason I'm making this recommendation, Judge Sweeney, is the family has asked me to recommend ten years on second degree murder because there has been money* - . That may have been off the record, it may have been on the record. That could have been – because I – like I said, I don't believe someone who is involved in the murder of two people – I mean, my general recommendation on murder second degree is a 15 year sentence, at the very minimum when somebody is killed, and *I thought this was deserving of 20 to 30 years if he*

pled guilty to second degree murder and this was against my recommendation as a prosecuting attorney that's trying to set a standard in Lawrence County for what is going to be done. And I think that goes to the fundamental fairness to everybody that comes in front of this court. We try to treat our defendants equally within that perimeter [sic]*, based on their involvement in the case.*

(Ex.88,at 57-58)(emphasis added). Contrary to the State's argument, the prosecutor's own testimony showed that he agreed to a ten-year plea for Lopez, *not* because he thought it was fair or right, but because Lopez could pay the victims' family. Money is an inappropriate, arbitrary reason on which to base a death sentence. *See e.g., Furman v. Georgia*, 408 U.S. 238, 242 (1972)(Douglas, J. concurring): "It would seem to be uncontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, *wealth*, social position, or class, or if it is imposed under a procedure that gives play for such prejudices." (emphasis added).

Prosecutor George's testimony establishes that Brandon was treated differently than similar homicide defendants because he could not pay the victims' family. George did not like this agreement; he did not initiate it; he thought it unfair. But George was the State actor entrusted with charging decisions. Only he could reduce the charges to second-degree murder. Only he could agree to the sentence. He admitted he reduced the charges and agreed to ten years solely so the victims' family would be paid.

The State ignores this evidence and ignores this Court's decisions that "prosecutions are undertaken and punishments are sought by the state on behalf of the citizens of the state,

and not on behalf of particular victims or complaining witnesses," *State v. Barnett*, 980 S.W.2d 297, 308 (Mo.banc1998); see also, *State v. Jones*, 979 S.W.2d 171, 179 (Mo.banc1998)(trial court need not follow the victims' family's wishes); and that due process requires that a court not consider the family's recommendation for a particular sentence. *State v. Taylor*, 944 S.W.2d 925, 938 (Mo.banc1997) (victim's family members' characterizations and opinions about the appropriate sentence are inadmissible under *Payne v. Tennessee,* 501 U.S. 808, 830 n. 2, 833 (O'Connor, J., concurring) and 835 n. (Souter, J., concurring), 824-26 (1991) and Sec.217.762.4, 565.030.4, and 595.209.1(4)).

The State ignores *Payne*, *Barnett*, *Jones*, and *Taylor*, and instead relies on a Ninth Circuit decision and three state court decisions for the proposition that considering the victims' family's wishes does not violate the constitution(Resp.Br.23-24). In none of these decisions did the prosecutor ignore what he believed to be a fair disposition, under the facts and circumstances, and defer to the family so that they could be paid.

In *State v. Wilson*, 316 S.E.2d 46, 51 (N.C.1984), the prosecutor considered the victim's family's wishes in deciding which defendants would be prosecuted for first-degree murder and subjected to the death penalty. The Court found that prosecutors must weigh many factors, like "the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the State, *and his own sense of justice in the particular case*." *Id*., at 51 (emphasis added). Considering the victim's family's wishes was permissible as long as the selection was not based on an "unjustifiable standard such as race, religion, *or other arbitrary factor*". *Id*. at 51 quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (emphasis added).

Unlike *Wilson*, George admitted that, until the arbitrary factor of money entered into the picture, the victims wanted Lopez to receive death. George did not follow "his own sense of justice," but let money control his decision. The ten-year sentence was unfair, unjust, under the facts and circumstances.

In *Townsend v. State*, 533 N.E.2d 1215, 1222 (Ind.1989), the prosecutor considered the victim's family's feelings on punishment - they desired "a heavy penalty." However, the prosecutor examined the facts of the particular case in deciding to seek death. *Id.* Additionally, Townsend could point to no arbitrary factor or discriminatory intent in the prosecutor's decision. *Id.*

In *Huffington v. State*, 500 A.2d 272, 284-85 (Md.1985), the prosecutor considered the victim's family's wishes in not agreeing to a plea bargain. The Court analyzed the claim under *Gregg* and *Furman*[3] and concluded, "absent any specific evidence of indiscretion by prosecutors resulting in irrational, inconsistent, or discriminatory application of the death penalty statute, Calhoun's claim cannot stand." *Huffington*, 500 A.2d at 285. Unlike *Huffington*, specific evidence shows George's indiscretion that resulted in irrational, inconsistent and discriminatory application of the death penalty, based on who could pay-off the victim's family.

In *McKenzie v. Risley*, 842 F.2d 1525, 1537 (9thCir.1988), the Court found that the Montana prosecutor could consider the victim's family's wishes in deciding to try the case. However, the victim's family could not decide the sentence, rather a death sentence must "be and appear to be based on reason rather than caprice and emotion." *Id*. quoting

Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion); and citing *Booth v. Maryland*, 482 U.S. 496 (1987).

Here, the victims' family was not simply offering input on whether to try the defendants, but were controlling the sentences they received. Whether the defendants lived or died depended, not on their moral culpability, but on whether they could pay the victim's family.

The State devotes much discussion to which standard of review should apply to Brandon's equal protection claim - strict scrutiny or rational basis (Resp.Br.18-24). It even suggests that the standard must be included in the amended motion (Resp.Br.24). Nothing in Rule 29.15 requires such pleading. Only the precise constitutional claim must be pled. Brandon's amended motion included his federal constitutional claims of due process, equal protection and Eighth Amendment prohibition against the arbitrary imposition of death (L.F.97-98).

Whatever the standard of review, George testified that he thought Lopez's sentence was unfair, and undeserved, under the facts and circumstances. He admitted he was treating similarly-situated defendants disparately (Ex.88,at 49-50, 57-58). The State fails to provide a compelling state interest, let alone a legitimate reason for this disparate treatment. Giving Lopez a ten-year sentence because his family won the lottery and he could pay thousands to buy his way out of a death sentence did not deter crimes or protect society as the State suggests (Resp.Br.24-25). Rather, it confirms the cynical view of our system: money talks, and who lives or dies depends on who can pay, not their level of

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[3] *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

culpability. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion).

As George noted, this violated "*fundamental fairness to everybody that comes in front of this court.*" (Ex.88,at 58). This Court must reverse for a new trial, in which the state cannot seek Brandon's death.

II. Jury Misled About Whether Lopez Would Receive Leniency for his Testimony

The State's argument that Lopez did not lie when he said the prosecutor was giving no deals is contrary to the record; the State improperly contends that the prosecutor did not mislead the jury by arguing that Lopez convicted himself of first-degree murder and would be held responsible, since the prosecutor intended to reduce the charges to second-degree murder and agree to a term of years; and Lopez's testimony that he hoped to receive leniency did not turn the tainted trial, based on false testimony, into a fair one.

Lopez told the jury Prosecutor George said he was giving no deals (T.Tr.1243). This was a bold-face lie. George knew it and the State should acknowledge it, too. George had had discussions with Lopez's attorney (Ex.88,at 17-30,R.Tr.207,209,217) and said that, if Lopez was a good witness at Brandon's trial, he would reduce Lopez's charges to second-degree murder(T.Tr.142,Ex.88,at 19,20,22). Although they had not reached a formal agreement on sentence, he was contemplating 30 years. *Id*. George acknowledged that, before Brandon's trial, "we were extending [Lopez] offers" (Ex.88, at 30). Lopez's attorney conveyed these plea discussions to Lopez before he testified against Brandon(R.Tr.220,229). Lopez knew that obtaining leniency depended on George's satisfaction with his testimony (R.Tr.220). Given this evidence, the State's argument that Lopez's testimony was truthful and did not mislead the jury (Resp.Br.30-31) must be rejected.

> A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.

Napue v. Illinois, 360 U.S. 264, 269-70 (1959), quoting *People v. Savvides*, 136 N.E.2d 853, 854-55 (N.Y.App.1956).

George had a duty to correct Lopez when he testified that George was giving no deals. George could have pointed out that they had plea discussions; that Lopez had asked for a deal; that he was considering reducing Lopez's charges to second-degree murder and was considering a term like 30 years. George should have been truthful, and disclosed that, while they had no final deal, he had extended Lopez offers, and was waiting to see how well he testified for the State.

George not only failed to correct Lopez's false testimony. He made it worse in his closing argument, arguing that Lopez was still charged with first-degree murder and didn't get out of anything (T.Tr.1820). Any reasonable juror would believe, given Lopez's testimony-- that George was giving no deals-- that Lopez would be convicted of first-degree murder and sentenced, *at a minimum*, to life without probation or parole.

The State suggests that George could lie to the jury, telling them he was giving no deals, because Lopez told the jury he was "hoping of leniency" (Resp.Br.31). The Supreme Court has rejected this argument soundly:

> Second, we do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a

> fair one … "What is overlooked here is that Hamer clearly testified that no one had offered to help him except an unidentified lawyer from the public defender's office." Had the jury been apprised of the true facts, however, it might well have concluded that Hamer had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which Hamer was testifying, for Hamer might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration.

Napue, 360 U.S. at 270.

Just as in *Napue*, here, a state's witness lied, while George knew the truth. Had the jury been apprised of the truth, that if Lopez testified well, the charges would be reduced, it may have found that Lopez fabricated[4] testimony to curry favor with George, who held his fate in his hands.

[4] Lopez fabricated testimony and his attorneys knew it. Lopez originally claimed that he believed the victims were dead in his garage because Salazar had shot them (R.Tr.163). At trial, he claimed they were alive and he wanted to call an ambulance to get them help (T.Tr.1110, 1112-13). His own attorney admitted he was concerned because Lopez had changed his story so many times, as new facts arose, incorporating them into his story (R.Tr.162). Given the facts now known to the State, to claim Lopez was truthful is incredible.

The American prosecutor plays a special role "in the search for truth in criminal trials." *Banks v. Dretke*, 124 S.Ct. 1256, 1275 (2004), quoting, *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The jury is entitled to know about a witness' continuing interest to please the State with his testimony. *Banks*, 124 S.Ct. at 1278. This is especially true here, where Lopez was guilty of murder too.

> Where a promise of leniency or other consideration is held out to a self-confessed criminal accomplice for his co-operation, there is a grave danger that, if he be weak or unscrupulous, he will not hesitate to incriminate others to further his own self-interest.

People v. Savvides, 136 N.E.2d at 855. Lopez lied, incriminating Brandon to further his own interest. The State had a duty to correct Lopez and tell the jury the truth. A new trial must result.

III.[5] Counsel Did Not Investigate Brandon's Background

The State ignores *Wiggins'* directives that counsel investigate all reasonably available mitigating evidence and that reviewing courts consider all the evidence counsel failed to present, along with that presented at trial to determine prejudice; the State ignores the trial attorneys' testimony that they did not adequately investigate Brandon's background and life history, failing to interview his treating psychiatrist, obtain background records, consult with experts, and interview family and friends; and the State improperly exaggerates the mitigating evidence presented at trial, thereby attempting to argue the failure to investigate mitigation did not prejudice Brandon.

The State argues that Brandon's trial counsel "extensively investigated appellant's background, his social history, and his mental condition and presented a complete picture of appellant during the penalty phase." (Resp.Br.43). This argument ignores the *Wiggins v. Smith* standard, the minimum requirements in a capital case:

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as "guides to determining what is reasonable." *Strickland, supra,* at 688, 104 S.Ct. 2052; *Williams v. Taylor, supra,* at 396,

[5] This reply responds to Points III, V, VI, and VII, regarding counsel's failure to investigate and present mitigating evidence.

120 S.Ct. 1495. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)[6] (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .... Investigation is essential to fulfillment of these functions").

Wiggins v. Smith, 123 S.Ct. 2527, 2536 -2537 (2003).

[6] Excerpts of the ABA guidelines referenced by the Court are included in the appendix (A 8-16).

Counsel failed to meet these standards. They obtained no medical records, although a psychiatrist treated Brandon for 3 ½ years during his teens. They obtained no hospital records documenting treatment for mental problems and drug and alcohol addictions. They never interviewed Dr. Parrish, Brandon's treating psychiatrist. They obtained no records from his pediatrician. They failed to investigate his educational history, getting none of his records, including those showing his Borderline Intelligence and Special Education placement. They failed to investigate his employment and training history. Their investigation into his family and social history was limited, interviewing Brandon's parents and one friend whom Brandon had known for 9 months. They did not follow up on leads, like Brandon's sexual abuse, because such topics embarrassed his parents, they did not want to discuss it, and minimized it. Counsel did not investigate Brandon's correctional history, ignoring his jail records that further documented his mental problems and his Borderline Intellectual Functioning. Counsel inquired into none of the religious and cultural influences affecting Brandon.

This is hardly the "extensive" investigation the State claims. The trial attorneys were inexperienced, handling their first death penalty case (Tr.932-34,1057,1059). They admitted they lacked time to adequately investigate (Tr.981,990,1003,1030). They knew Brandon grew up in California and wanted to investigate his background further (Tr.1064). They wanted to get his background records, but lacked time and resources to do so (Tr.974-78,1030, 1042). They did not hire a mitigation specialist. They did not follow-up on leads to readily available mitigation: a psychiatrist treated Brandon for Bi-Polar Disorder by a psychiatrist; Brandon had Borderline Intellectual Functioning; Brandon had been sexually

abused; and Brandon had been hospitalized for his mental problems (Ex.12). Counsel honestly admitted their mistakes and lack of investigation. The State ignores this testimony and, based on no evidence, portrays their investigation as thorough and complete (Resp.Br.34,38,50,68-69,72-74).

The State ignores *Wiggins*' directive that counsel investigate all reasonably available mitigation, and *Wiggins*' directive that courts consider all mitigation not presented at trial, together with that presented at trial, to determine whether prejudice resulted (Resp.Br.75). The State suggests that Brandon's claim of ineffectiveness differs from Wiggins' claim regarding the failure to investigate his life history, asserting Brandon made individual claims regarding each family member. *Id*.

A review of Brandon's amended 29.15 motion refutes these assertions. Claim 8(V) addressed counsel's failure to investigate mental health and mitigating evidence, referencing expert and lay witnesses and records (L.F. 66). It alleged, "Counsel's failures and omissions, both individually and *cumulatively***,** including but not limited to those listed below, resulted in movant being denied a fair trial and due process and subjected movant to cruel and unusual punishment." (L.F.67). It later alleged:

> 6. Here, movant's counsel failed to adequately prepare for or investigate the facts and circumstances supporting a case in mitigation during the penalty phase of movant's trial despite that a wealth of *both statutory and non-statutory mitigating evidence existed in this case, including but not limited to, the examples listed below. Counsel*

failed to discover and present all substantial, available mitigating evidence.

(L.F.69) (emphasis added). Brandon's Claim V pled specific witnesses, experts, and records, but was comprehensive and, like *Wiggins*, alleged counsel's ineffectiveness in failing to discover readily available mitigation (L.F.66-93). This Court should follow *Wiggins* and reject the State's effort to avoid its application.

Finally, the State exaggerates the evidence presented at trial, thereby arguing that all of the mitigating evidence that counsel never discovered was cumulative (Resp.Br.32,35,51). Counsel obtained no background records, despite their ready availability (Tr.974-78,1030,1042). Thus, the jury never considered Brandon's Special Education Records showing his borderline intellectual functioning, mitigation found compelling in *Williams*. The jury never considered Brandon's psychiatric records, which documented his sexual abuse, mitigation found compelling in *Wiggins*. The jury never had access to Brandon's medical records, which documented his psychiatric problems and drug and alcohol addiction, mitigation under *Wiggins* and *Parker v. Dugger*, 498 U.S. 308, 314-16 (1991). Since ***no*** records were presented at trial, this evidence cannot be considered cumulative.

The State's argument that the records were hearsay and could not be considered (Resp.Br.39) is wrong. *Wiggins* held that a mitigation specialist may rely on witness interviews and records to develop a life history. *Green v. Georgia*, 442 U.S. 95, 97 (1979) held that excluding hearsay testimony, highly relevant to

critical issues in penalty phase, violates Due Process. Additionally, the State position here, that the records were inadmissible, is contrary to its argument at trial. At trial, the State criticized defense counsel for relying on Brandon's statements to Dr. Bland and not documenting his problems (T.Tr.1891-93,1903,1906).

Counsel's failure to consult with any experts regarding mitigating evidence also violated *Wiggins* and ABA Guideline 11.4.1,D.7.[7] Counsel hired Dr. Bland to determine whether Brandon was competent to stand trial and suffered from a mental disease or defect(Ex.12). Bland did not evaluate Brandon to determine mitigating factors. Contrary to the State's argument that Bland testified "extensively" (Resp.Br.35) and did a "thorough" evaluation (Resp.Br.48), his evaluation was brief and he considered no collateral sources, relying solely on Brandon (Ex.12,at 2). The State exploited these deficiencies at trial (T.Tr.1891-93,1903,1906), but it now seeks to ignore them.

The State even exceeds exaggeration, saying Dr. Bland testified about Brandon's Bi-Polar Disorder (Resp.Br.32,35,51). The record shows the truth. Dr. Bland testified that this major mental illness diagnosis was not substantiated, and he concluded that Brandon did not suffer from it (Ex.12,at 7).

When this Court considers the constitutional requirements set forth in *Wiggins* and *Williams* and this record, it will find counsel's failures to investigate

[7] The State's argument that counsel must be aware of a particular expert's name before he has a duty to consult (Resp.Br.53,55,59) contravenes *Wiggins* and the ABA Guidelines.

Brandon's background and to readily available mitigation constitutionally ineffective. A new penalty trial must result.

IV. Appellate Counsel's Effectiveness Is Reviewed Under *Strickland* Standard and Death Penalty Cases Mandate Careful Scrutiny, Including Review of All Colorable Claims

The State's argument that appellate counsel's ineffectiveness is judged by the plain error standard is contrary to precedent. Its suggestion that counsel may winnow meritorious claims in a capital case violates the principle that, since death is different, every colorable claim of error must be carefully scrutinized.

Citing *Moss v. State*, 10 S.W.3d 508, 514 (Mo.banc2000), the State suggests this Court should review appellate counsel's effectiveness under the plain error standard (Resp.Br.45). The State ignores that, post-*Moss*, this Court held that claims of ineffective assistance of counsel must be reviewed under the *Strickland*[8] standard, not the plain error standard. *Deck v. State*, 68 S.W.3d 418, 425-29 (Mo.banc2002).

This Court's decision in *Deck* is not limited to trial counsel's ineffectiveness. Claims of appellate counsel's effectiveness must also be judged under *Strickland*. *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (proper standard for evaluating petitioner's claim of ineffective assistance for not filing a merits brief is *Strickland*).

To establish ineffective assistance of appellate counsel, Brandon must show counsel acted unreasonably, and a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Smith v. Robbins*, 528 U.S. at 285-86.

[8] *Strickland v. Washington*, 466 U.S. 668 (1984).

Applying *Strickland* to appellate counsel's failure to raise meritorious claims is not difficult. *Id*. at 287-88. The Court must determine whether counsel ignored issues clearly stronger than those presented. *Id*. at 288, *citing, Gray v. Greer*, 800 F.2d. 644, 646 (7thCir.1986).[9] *Strickland* does not require the issue be a "dead-bang winner." *Neill v. Gibson*, 278 F.3d 1044, 1057 (10thCir.2001). That requirement would be more onerous than *Strickland's* reasonable probability standard. *Id.*

Here, appellate counsel failed to raise a meritorious issue-that the trial court abused its discretion in not granting a continuance so that trial counsel could investigate and present mitigation. Although this issue was preserved for review, appellate counsel omitted it, while pursuing weaker, unpreserved issues.

Counsel raised plain error and abuse of discretion claims, while ignoring the preserved and factually-supported continuance claim. Of seven issues on direct appeal, three were unpreserved. *State v. Hutchison*, 957 S.W.2d 757, 760 (Mo.banc1997). This Court found the briefed issues lacked merit, and created no manifest injustice. *Hutchison*, *supra* at 764-65. Counsel raised other claims alleging an abuse of discretion (Point VI-late endorsement of penalty phase witness and Point IV- the court's failure *sua sponte* to disallow the State's improper opening statement) (App.Br.13-15).

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[9] *Greer* noted other circuits also review claims of appellate counsel's effectiveness under *Strickland*. *Greer*, 800 F.2d at 646, *citing, Bowen v. Foltz*, 763 F.2d 191, 195 (6thCir.1985); *Schwander v. Blackburn*, 750 S.W.2d 494, 502 (5thCir.1985); *Mitchell v. Scully*, 746 F.2d. 951, 954 (2d Cir.1984).

The State suggests that this Court defer to counsel's desires to "winnow" meritorious claims and raise only those with the best chance of winning (Resp.Br.45). This argument ignores the contents of the record, the case law and the Constitution.

Counsel could not even recall why he did not raise the continuance issue (L.F.628,646), so labeling this a strategic decision to winnow a claim in favor of stronger ones is unsupported. Counsel recalled that trial counsel had less than eight months to prepare for their first death penalty trial and had requested a continuance because they needed more time to prepare for penalty phase (L.F.626-27). Under these circumstances, the claim had merit.

Counsel's failure to raise this issue was based, in part, on his lack of knowledge of the law. Counsel admitted he knew of no Missouri or federal cases that had reversed for failure to grant a continuance motion (L.F.629-30). Yet, only a few years earlier, this Court reversed a death penalty case, finding the trial court's failure to grant a continuance an abuse of discretion. *State v. Whitfield*, 837 S.W.2d 503,507(Mo.banc1992). See also, *State v. McIntosh*, 673 S.W.2d 53, 54-55(Mo.App.W.D.1984)(abuse of discretion for failure to grant a continuance necessary for the defense to prepare for trial); *State v. Perkins*, 710 S.W.2d 889,893(Mo.App.E.D.1986)(failure to grant a continuance is abuse of discretion). These cases were decided long before Brandon's appeal, but appellate counsel was unfamiliar with them (L.F.629-30).

Death penalty appeals are different than non-capital appeals. "Although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence *mandates careful scrutiny in the review*

of every colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (emphasis added). "Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). The American Bar Association advocates raising "all arguably meritorious issues, including challenges to any overly restrictive appellate rules." American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Section 11.9.2D (1989). These Guidelines form the standard of practice in death penalty cases and are constitutionally-required. *Wiggins v. Smith*, 123 S.Ct. 2527, 2537 (2003). See also ABA Guidelines, February 2003, Guideline 10.15.1.C. The Commentary regarding direct appellate counsel's duty reveals the danger of "winnowing" claims:

> "Winnowing" issues in a capital appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited.

Id. The Commentary cites *Smith v. Murray*, 477 U.S. 527 (1986). There, direct appellate counsel failed to assert that the testimony of a psychiatrist who examined the defendant, without warning him that the interview could be used against him, violated the defendant's Fifth Amendment rights. *Id*. The omitted claim was found meritorious in *Estelle v. Smith*, 451 U.S. 454 (1981), but Smith was barred from raising it in federal habeas, because of direct appellate counsel's error. Smith was subsequently executed. Commentary, at n. 341.

This Court must apply *Strickland* in evaluating Brandon's claim of ineffective assistance of appellate counsel. That review demonstrates counsel's ineffectiveness. A new penalty phase should result.

CONCLUSION

Based on the arguments in his original brief, and in his reply, Brandon requests the following:

Point I, a new trial in which the state is precluded from seeking death, or alternatively, life without parole;

Points II, VII, and VIII, a new trial;

Points III, IV, V, and X, a new penalty phase;

Point IX, vacate his death sentence and impose life without parole; and

Point XI, remand for further proceedings consistent with Rule 29.16.

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The reply brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the reply brief contains 7,405 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this reply brief contains a complete copy of this reply brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in June, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this reply brief were postage pre-paid this 10th day of June, 2004, to Stephanie Morrell, Assistant Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65109.

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Melinda K. Pendergraph